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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM ANDREWS, :
 :
 Petitioner-Appellant, :
 :
 -vs- : Case No. 16168
 :
 LAWRENCE MORRIS, As Warden :
 of the Utah State Prison, :
 :
 Respondent-Appellee.

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

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From the day this case first went to court, Appellant William Andrews has sought one thing: the opportunity for a full hearing in which he could present argument and evidence showing the sentence of death he is under was imposed in violation of his constitutional rights.¹ He has still not had that hearing. This Court's decision upholds the denial of that hearing, but at the same time reaches what the Court construes as the merits of his claims, and finds his sentence valid. Appellant respectfully submits that, because no full hearing on these issues has been granted, the Court has misconstrued his claims and erroneously decided the issues his Petition raises, in the following particulars.

¹ At page 7 of the Court's opinion, it says that "the hearing on the motion to dismiss the petition proceeded without objection or request for continuance." With all respect, Appellant submits that through this entire proceeding this Petitioner has been requesting a continuance. The transcript of the hearing below makes it absolutely clear that it was Petitioner's position opposing the dismissal motion below that the merits of the issues in the Petitions could not properly be considered without further hearings and briefing, see Transcript 11/30/78 at 26-27, 29, and that has been his position ever since, see App. Br. 1-2.

1. The Court's summary rejection of Appellant's claims relative to the unconstitutionality of the Utah Death Penalty Statutes applied in this case fails to address all the concerns of Appellant's Petition and is inconsistent with the Court's recent decision in State v. Brown.

Appellant's Petition in this case pointed to several aspects of the Utah Death Penalty Statutes under which sentence was imposed in his case which rendered those statutes constitutionally deficient under Furman v. Georgia, 408 U.S. 238 (1972), and Supreme Court cases subsequent to it. See Petition, page 4. The Petition pointed out that sentencing juries have "unguided and unfettered discretion to choose which capitally convicted defendants will be sentenced to death," without making any findings after conviction and without saying more in their verdict than "the defendant is sentenced to death"--the single declaration on which Petitioner's death sentence rests. See Petition, page 4; Verdict Forms, (Petition, Appendix G). It pointed out that aggravating circumstances, even as elements of first degree murder, were not required to be pleaded by the State, found unanimously by the jury, or anywhere specified in the verdicts. Petition, page 5. It alleged that evidence of "aggravating" factors other than those statutorily specified were admitted at the sentencing proceeding, that the prosecution argued for the imposition of death for reasons outside the statute, and that no limitations were placed on the evidence admissible at the sentencing phase. *Id.* at 5-6. It pointed out that no

standards were given the jury by which to make findings, or weigh the factors it found, other than a general instruction that the State bore the burden of showing that the death penalty was "appropriate." Id. at 6-7. And it claimed that, on such a record, this Court's review could not provide any safeguard against arbitrariness and caprice. Id. at 8-9.

This Court's opinion addresses only a few aspects of these issues. It holds the statutory list of "aggravating circumstances" sufficient to give notice in any particular case; it rejects any requirement of additional written findings supporting a sentence of death, after a guilty verdict, though such findings have been required by all statutes upheld by the Supreme Court to date (see App.Br at 18); and it apparently assumes that the requirements of Presnell v. Georgia, 439 U.S. 14 (1978) can be met without the appellate court knowing what aggravating circumstance the jury found proven in a given case. Opinion, pages 8-12. But it nowhere addresses Petitioner's further claims, and reaffirms its upholding of the Utah Statutes without mentioning them.

The Utah procedures followed here much more closely resemble those of the statutes held unconstitutional in Furman than those upheld in Gregg v. Georgia, 428 U.S. 167 (1976) and its companion cases. In none of the statutes upheld to date has there been the totally unlimited range of sentencing considerations, aggravating or mitigating, Utah's statutes

allow--so that in this case the jury could have sentenced Petitioner to death for any reason, not just those listed as aggravating factors. In none of them has there been the total lack of restrictions on sentencing evidence there is under this State's law--so that in this case not even constitutional evidentiary limitations were observed, and no prehearing notice of evidence required so that the prosecution's claims could be fully confronted and tested. Cf. Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979). In none of the laws upheld to date has the jury been allowed to choose any convicted murderer for either life or death, without even saying why--as the jury was here. And in none have the jurors been given so little guidance as they were here in finding the relevant sentencing facts and weighing them--so that in this case life and death depended only on what the jury found "appropriate."

This Court's recent opinion in State v. Brown, No. 15481 (February 7, 1980), seems to recognize the constitutional considerations which the recent capital cases have established, and to have applied them to do two things: to require that "scrupulous care must particularly extend to evidence introduced by the State in the penalty phase" of a capital case, and to reiterate and enforce its dictum that the jury must be instructed that "'the totality of evidence of aggravating circumstances must . . . outweigh the totality of mitigating circumstances.'" State v. Brown, at 14, quoting

State v. Pierre, 572 P.2d 1338, 1348 (Utah 1977). Yet in this case the very deficiencies Brown turned on were present, in addition to those others listed above. In this case evidence was admitted at the sentencing phase which had nothing to do with any aggravating circumstance--evidence of penological theory and religious opinion (T. 4197-4246), evidence of the defendant's mental status and work performance (T. 4134-4163), evidence which included hearsay on hearsay (see, e.g. T. 4142-8) and which was often factually inaccurate (T. 4167). And here, too, the jury was never told it had to find that the aggravating circumstances outweighed the mitigating circumstances to impose death; instead, it was instructed that "[t]here is no fixed standard as to the degree of persuasion needed for a particular sentence" though "the burden of proof to satisfy the jury that a death sentence is appropriate is on the State." Sent. Inst. 2.

The continued affirmance of the proceedings in this case is inconsistent with the holding of Brown, and the statutes which permit such undirected proceedings as these are irreconcilable with the requirements the Supreme Court has imposed. Though this Court may be able, by interpretation, to construe the Utah Death Penalty laws in a way that confines jury discretion, limits the scope of aggravation, and imposes a constitutionally tolerable burden of proof on the State, it cannot change the fact that such procedures were not followed in this case, and that the failure to follow them violates the constitution.

2. The Court's rejection of Petitioner's claim that his death sentence is unconstitutional because he was not proven or found to have intended the deaths of the victims misconstrues the record in this case.

One of the claims in this appeal was that the District Court improperly dismissed the Petition here without the transcript of the case before it. See App. Br. 11. This claim was partly mooted by the Court's examination of the record, and the stipulation of the parties that the record was available. But the difficulties of assessing the record without a full hearing on it are nonetheless apparent from the Court's decision: for the Court's opinions contain significant misstatements about the facts of this case, Petitioner Andrews' role in it and the findings about it the jury was required to make.

The court's statement that "[t]he record in this case reveals the evidence supporting the aggravating circumstances and discloses that the evidence in mitigation was virtually nonexistent," Opinion, page 10, exemplifies this misunderstanding. Neither half of this statement is accurate as to Petitioner William Andrews. The record reveals that at least three of the aggravating circumstances on which the jury was charged were wholly without evidentiary basis as to this Petitioner, and that there was undisputed evidence in

support for at least four of the six statutorily listed mitigating circumstances. William Andrews undisputedly did not cause the deaths of any of the victims; there was no evidence he created a "great risk" to their lives; there was no evidence he knew of or participated in any rape. See below. His criminal record was far from "significant," involving one minor theft conviction (T. 4255); his alleged involvement in the crime was plainly "under duress or substantial domination of another;" he was a "youth," aged 19 at the time of the crime (T. 4248); and the worst allegations against him made him "a party to the murder committed by another person and . . . his participation was relatively minor" See U.C.A. 1953 76-3-207.

The Court's misinterpretation of these facts has its greatest significance in its rejection of Petitioner's argument that his death sentence is constitutionally disproportionate to his level of involvement in the offense here. The Court flatly rejects Petitioner's claim, saying "Andrews was an active participant in the acts of torture" and contrasting that to Lockett v. Ohio, 438 U.S. 586 (1978) where the Court says the defendant was merely "the 'wheelman' in a robbery which resulted in a murder." Opinion, page 11.

In fact, the sole evidence of Petitioner Andrews' participation in any of the acts which injured the victims here was Mr. Oren Walker's testimony that, at one point Andrews

picked up a container and poured a caustic liquid into a cup Pierre was holding. T. 3077. Mr. Walker testified clearly it was Pierre who forced each of the victims in turn to drink from the cup. T. 3084-5. Though Mr. Walker thought the cup was refilled by Andrews, all he could actually see was the movement of the two men's legs. Ibid. He testified that both at that point, and later before Andrews left and the killings took place, he heard Andrews say "I can't do it, I'm scared." T. 3092, 3183. Mr. Walker indicated Andrews "was disturbed during the whole evening" (T. 3176-7), that Andrews protested when Pierre first fired his gun (T. 3072, 3175), and that the two men engaged in a heated conversation in which he heard Pierre say "what about me being booked," before any of the victims were harmed. T. 3074. And Mr. Walker testified clearly that each of the shootings, the apparent rape of Michelle Ainsley and the final assaults on Mr. Walker himself, were all done by Pierre after Andrews had argued with him and left. See T. 3101-13, 3188-90.

Though concededly a jury might reach an opposite conclusion, the testimony of Mr. Walker surely does not compel a conclusion that the person identified as William Andrews intended to kill any of these victims. Mr. Walker's description of the incidents would support, at least as strongly, the defense theory that that man may well have had no intent to kill, but played only a limited and reluctant part

in acts he could not stop, acts which were not lethal. See T. 4295-7. On the facts of this case--just as on the facts of Lockett v. Ohio, where the defendant planned the robbery, obtained the gun, and then hid it after the killing (438 U.S. 590), or the facts of Bell v. Ohio, 438 U.S. 637, 639 (1978), where the defendants accused each other of committing the actual homicide--the evidence was susceptible to two possible conclusions. The jury may or may not have found against the defendant on the evidence, on the question of specific intent.

The critical issue, under Justice White's opinion in Lockett and Bell, is whether the jury made such a finding that "the defendant possessed a purpose to cause the death of the victim." 438 U.S. 624. As Justice White said in Lockett, "there is a vast difference between permitting a factfinder to consider a defendant's willingness to engage in criminal conduct which poses a substantial risk of death in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as the ultimate fact equivalent to possessing a purpose to kill." 438 U.S. at 627. The instructions given in Lockett did not require the jury to specify whether it found a specific intent (438 U.S. 593), and neither did the instructions in this case.

Though both the majority and concurring opinions in this case seem to accept the principles of Justice White's opinion in Lockett, they erroneously assume that "the jury was

instructed with great care that the death penalty could be imposed only if the jury found that each defendant personally intended that one or more of the victims be killed."

Concurring Opinion, page 15. In fact the jury was given an array of instructions on the Utah "parties" rule, which fell far short of requiring a finding of specific intent to kill in order to convict. It was told that a person was a party to a murder if he perpetrated it himself, "intentionally helped plan or assisted in the advancement of the murder with intent that it would take place, and did not effectively withdraw before the killing," "intentionally rendered active advice during the murder, or...intentionally helped the murderer escape." Instr. 8, Pet. App. G. It was then told, somewhat inconsistently, that "a party to a robbery...is also a party to the killing that may occur therein, only if he knew the killing was planned ...or if he knows certain co-parties planned to kill if certain contingencies occur" (Instr. 12), and further that "once an individual indulges in planning or the assisting of criminal conduct he is responsible for the furtherance of that criminal conduct unless he has effectively withdrawn" (Instr. 13). The prosecutor condensed this to argue that being a "party" was enough: that even if a defendant "didn't actually do the killing himself," "if he intentionally helped plan or assisted in the advancement of the murder...and did not effectively withdraw...rendered active advice during the murder, or he

intentionally helped the murderer escape from the immediate scene of the crime, then that person . . . is just as guilty [o]f murder as the actor." T. 3815. (emphasis added).

Under these instructions, the jury had no choice but to convict Petitioner Andrews of murder, once it found he was the person who assisted in the robbery, whether or not it believed he intended that any of these killings take place. Under the evidence in this case, it is fully possible that the jury was not convinced that he did. A death sentence imposed in such circumstances cannot be squared with the proportionality principles laid out in Justice White's opinion in Lockett, and the Court should grant a rehearing on this aspect of its opinion.

3. The Court's rejection of Petitioner's claim that the method of execution in Utah is unconstitutional fails to consider the factual information Petitioner has sought to produce in support of his contention.

The Court's majority opinion summarily rejects on the merits Petitioner's claim that "the imposition of the death penalty by shooting or hanging is 'cruel' and 'unusual'," Opinion, page 11, without permitting Petitioner the hearing he requested with which he could establish the factual claims on which this contention must be based. The legal authority Petitioner cited in support of this claim establishes only that a punishment is unconstitutional if it "makes no measurable contribution to acceptable goals of punishment and hence is

nothing more than the purposeless imposition of pain and suffering." Coker v. Georgia, 433 U.S. 584, 592 (1977). That legal test cannot be applied without a determination of certain facts, including whether a particular punishment imposes "pain and suffering," and whether it makes any "contribution to acceptable goals of punishment."

The Petition in this case sought a factual hearing on precisely these points. Petition, page 10. On appeal, Petitioner specifically alleged that, if given a hearing, he could demonstrate that the methods of execution used in this state do inflict pain and suffering, and "serve no penal purpose but to satisfy certain doctrines of the Mormon Church." App. Br. 23. These contentions are not frivolous and cannot be rejected without a factual determination: there is a growing body of legal literature which concludes that hanging and shooting are torturous and societally unacceptable methods of execution, see Gardner, Executions and Indignities--An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO ST. LAW J. 96, 119-125 (1978), and that the sole purpose for the institution of Utah's peculiar execution laws is the satisfaction of the Mormon Church Doctrines of "blood atonement" and election of salvation, Gardner, Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality Under the Establishment Clause--A Case for Consideration: The Utah Firing Squad, 1979 WASH. U. L. Q. 435.

Certainly, this Court cannot determine whether these allegations are true without examining evidence regarding the pain involved in death by these means, and considering historical evidence about their genesis and possible purposes. Clearly, Wilkerson v. Utah, 99 U.S. 130 (1878), relied on by the Court, is not dispositive of this issue. In Wilkerson the issue was not whether death by shooting was cruel and unusual, but whether the trial court could validly impose such a sentence in the absence of statutory authority. See Furman v. Georgia, 408 U.S. 238, 284 n.30 (1972) (Brennan, J.). Though the Court in Wilkerson did go on, in dicta, to say that the penalty was not unconstitutional, it did so applying societal standards over 100 years old, and making assumptions that "unnecessary cruelty" was not involved in such executions (99 U.S. 135) which the Petition here directly challenged. This Court should not reject that challenge without having heard it.

CONCLUSION

The summary disposition of these issues has deprived the court of the benefit of a full evidentiary record and deliniation of the relevant facts, and has deprived Petitioner of the right to a full hearing on his factual and legal claims. See, e.g., Martinez v. Smith, No. 16393 (October 24, 1979). Petitioner respectfully requests that the Court grant him a rehearing, so that he can fully present his claims to this court, and so that the factual bases for his arguments can be presented in some forum before they are rejected.

DATED: March 2, 1980.

Respectfully submitted,



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